



CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

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Gifts: Legal Defense Funds

Charter Sections: 2601(15), 2604(b)(2), 2604(b)(3), 2604(b)(5)

Board Rules: 1-01(a)

Opinions Cited: 92-10, 92-23, 2013-1

Advisory Opinion No. 2017-2

The Conflicts of Interest Board (the “Board”) has received requests for advice from public servants who proposed to establish legal defense funds that would help defray their legal expenses. As set forth more fully herein, the Board has concluded that contributions to legal defense funds for public servants are no different from gifts directly to the public servant and thus are subject to the gift restrictions of Chapter 68 of the New York City Charter, the City’s conflicts of interest law, and related Board Rules.

The Board recognizes that legal expenses can burden public servants. However, neither Chapter 68 nor any other City law distinguishes contributions to legal defense funds from other gifts. In the absence of specific legislation that distinguishes gifts made to public servants through legal defense funds from other gifts to public servants, there is no legal basis for the Board to treat gifts made through legal defense funds differently.

I. Relevant Law

Charter Section 2604(b)(2) provides that “[n]o public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.”

Charter Section 2604(b)(3) prohibits a public servant from using or attempting to use “his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.” The Board has held that this provision prohibits, among other things, a public servant from accepting a gift from a subordinate public servant, except on special occasions. See Advisory Opinion No. 2013-1 at 6.

Charter Section 2604(b)(5) states: “No public servant shall accept any valuable gift, as defined by rule of the board, from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city, except that nothing contained herein shall prohibit a public servant from accepting a gift which is customary on family and social occasions.” Pursuant to the mandate of Charter Section 2604(b)(5), the Board enacted its Valuable Gift Rule, Board Rules Section 1-01(a), which defines “valuable gift” to be any gift with a value of \$50.00 or more.

As noted in *COIB v. Markowitz*, COIB Case No. 2009-181 (2011), “the Board has long advised that, in addition to the prohibition in Charter Section 2604(b)(5) against accepting valuable gifts from persons or firms that have business dealings with the City, a public servant may violate Charter Section 2604(b)(3) by accepting a gift even if the donor does not have such dealings, if the public servant is receiving the gift only because of his or her City position.” The Board in that

matter found that the public servant at issue received the gift of travel for the public servant's wife because of his City position. Similarly, in Advisory Opinion Nos. 92-10 and 92-23, the Board held that an elected official's acceptance, respectively, of an invitation to stay at a resort or of the gift of air travel to the location of the elected official's choosing would violate Charter Section 2604(b)(3), even though neither firm offering the gift had business dealings with the City. In both of these cases, the Board determined that the acceptance of such gifts would create the appearance that the elected official received the gifts because of his official position. See Advisory Opinion Nos. 92-10 and 92-23.

II. Discussion

Legal expenses connected to a public servant's official duties are often paid for, or indemnified by, the City. See New York Public Officers Law § 18; New York General Municipal Law § 50-k. Certain other legal expenses, as determined by the applicable election and campaign finance laws, may be paid for out of campaign committee funds. The Board does not consider contributions to campaign committees to be gifts within the meaning of the conflicts of interest law, so that contributions to such committees are governed not by Chapter 68 but instead by the applicable election and campaign finance laws.

In contrast, when legal expenses are to be paid by neither the City nor regulated campaign committees, but instead by legal defense funds established to receive contributions for this purpose, the Board considers contributions to such legal defense funds as it would any gifts to the public servant personally. Similarly, the New York State Attorney General held in Informal Opinion No. 2005-10 that donations given to municipal officials to pay legal expenses incurred in their individual

capacities are considered gifts within the meaning of General Municipal Law § 805-a. See New York State Attorney General Informal Opinion No. 2005-10.

In making this determination, the Board considers the existing legislative and regulatory framework contained in Chapter 68 and the Rules of the Board. While other jurisdictions have enacted legislation that specifically regulates legal defense funds, New York City has not. See, for example, Mich. Comp. Laws §§ 15.521 to 15.539; Or. Rev. Stat. §§ 244.205 to 244.221; Wisc. Stat. §§ 11.1301 to 11.1304 (each authorizing a public official to create a legal defense fund to defray certain legal expenses incurred by the public official). In the absence of specific legislation that distinguishes gifts made to public servants through legal defense funds from other gifts to public servants, there is no legal basis for the Board to treat gifts made through legal defense funds differently.

The Board accordingly advises that a public servant may accept, whether through a legal defense fund or otherwise, gifts to offset legal expenses only on the following terms:

- 1) A public servant may not accept a contribution from his or her City subordinates. The Board has determined that a public servant violates Charter Section 2604(b)(3) by accepting a gift from a subordinate, except for gifts appropriate to a special occasion, such as the birth of a child, a wedding, or retirement. See Advisory Opinion No. 2013-1 at 6. The need to pay personal legal expenses is not such an occasion.
- 2) A public servant may not accept a valuable gift, that is, a contribution of \$50.00 or more, or a series of contributions (or other gifts) over any twelve-month period worth \$50.00 or more, from any person or firm having, or intending to have, business dealings with the City. If two or more donors are relatives or domestic partners of one another, the \$50.00 per twelve-month period restriction applies to the aggregate of their donations. So, too, if

two or more donors are directors, trustees, or employees of the same firm or affiliated firms, the public servant may not accept contributions totaling \$50.00 or more in the aggregate from such groups of people in any twelve-month period. See Charter Section 2604(b)(5); Board Rules Section 1-01(a). A public servant is required to make a “reasonable inquiry” to determine if a donor has business dealings with the City. See In re Safir, COIB Case No. 99-115 (2000).

- 3) A public servant may accept contributions in *any* amount from a family member or close personal friend who is *not* engaged in business dealings with the City, who does not appear before the City, and who otherwise has no non-ministerial dealings with the City.¹
- 4) For contributions from virtually all others—from non-subordinate City employees, constituents, and others who, although not engaged in business dealings with the City, know of a public servant by virtue of his or her City position—the Board will presume that the public servant is being offered contributions only because of his or her City position. This presumption is particularly strong for a high-ranking public servant. As a result, the public servant’s acceptance from these persons of a valuable gift, that is, a contribution of \$50.00 or more, would presumably violate Charter Section 2604(b)(3) as a misuse of the public servant’s City position. See Charter Section 2604(b)(3); Board Rules Section 1-01(a); Advisory Opinion Nos. 92-10 and 92-23; *COIB v. Markowitz*, COIB Case No. 2009-181 (2011).

¹ Charter Section 2601(15) defines “ministerial matter” as “an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion.”

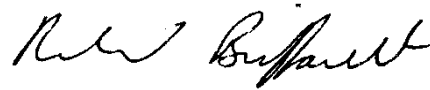
III. Conclusion

As noted above, legal expenses can burden public servants. However, contributions to legal defense funds to defray those legal expenses must be viewed as gifts to those public servants within the meaning of Chapter 68. Exempting legal defense fund contributions from otherwise applicable gift restrictions would require a Charter amendment or local legislation that so provides.

As a result, under current law, a public servant may accept, whether through a legal defense fund or otherwise, gifts to offset legal expenses *only* on the following terms:

- 1) A public servant may not accept contributions from his or her City subordinates.
- 2) A public servant may not accept a valuable gift, that is, a contribution of \$50.00 or more, or a series of contributions (or other gifts) over any twelve-month period worth \$50.00 or more, from any person or firm having, or intending to have, business dealings with the City. If two or more donors are relatives or domestic partners of one another, the \$50.00 per twelve-month period restriction applies to the aggregate of their donations. So, too, if two or more donors are directors, trustees, or employees of the same firm or affiliated firms, the public servant may not accept contributions totaling \$50.00 or more in the aggregate from such groups of people in any twelve-month period. A public servant is required to make a reasonable inquiry to determine if a donor has business dealings with the City.
- 3) A public servant may accept contributions in *any* amount from a family member or close personal friend who is *not* engaged in business dealings with the City, who does not appear before the City, and who otherwise has no non-ministerial dealings with the City.
- 4) For contributions from virtually all others—from non-subordinate City employees, constituents, and others who, although not engaged in business dealings with the City,

know of a public servant by virtue of his or her City position—the Board will presume that the public servant is being offered contributions only because of his or her City position. As a result, the public servant’s acceptance from these persons of a valuable gift, that is, a contribution of \$50.00 or more, would presumably violate Charter Section 2604(b)(3) as a misuse of the public servant’s City position.

A handwritten signature in black ink, appearing to read "Richard Briffault".

Richard Briffault
Chair

Fernando A. Bohorquez, Jr.
Andrew Irving
Anthony Crowell
Erika Thomas

Dated: March 29, 2017